

EMBASSY OF CHILE
1732 Massachusetts Ave., N.W.
WASHINGTON, D.C. 20036



Washington, D.C., April 24, 2006


Docket Clerk
Marketing Order Administration Branch
Fruit and Vegetables Programs
AMS, USDA
1400 Independence Avenue, SW
STOP 0237
Washington, DC 20250-0237

RE: Docket No. FV06-925-610 Review
Federal Register Vol. 71, No. 34, Page 8810
Grapes Grown in a Designated Area of Southeastern California
Notice of Review and Request for Comments

Dear Docket Clerk:

Please find enclosed the comments of the Government of Chile concerning the notice of review and request for comments of Marketing Order 925 on grapes grown in a designated area of Southeastern California, published in the Federal Register on February 21, 2006.

Sincerely,


Andrés Bianchi
Ambassador of Chile

REVIEW MARKETING ORDER 925

COMMENTS BY THE GOVERNMENT OF CHILE

On February 21, 2006, the Agricultural Market Service (AMS) published in the Federal Register the notice of review and request for comments of Marketing Order 925 on grapes grown in a designated area of Southeastern California. The review of MO's regulation comes from a requirement of the Regulatory Flexibility Act (section 610).

The purpose of the AMS review is to determine whether the rules should remain the same, amended or rescinded, including the degree to which technology, economic conditions, or other factors have changed in an area affected by the MO.

For the Government of Chile, the imposition of quality requirements for products, such as those contained in the MO 925, and the companion Import Regulation 4, constitute a classical example of how a measure could be taken to distort trade and create artificial and unnecessary barriers to do business, contrary to the spirit of Chile-United States Free Trade Agreement (Chile-U.S. FTA) and the WTO-Technical Barriers to Trade Agreement.

Economic Aspects

It is important to mention that the United States market demand is met by complementing domestic production (50%), with global supply (50%), being Chile the main source. Grapes supplied from Chile largely serve the market when US-grown grapes are not available.

The imposition of a marketing order for the purpose of controlling the overall supply is against the United States Department of Agriculture's (USDA) declared administrative policy, as it creates an inefficient market intervention. Under established policy, the issuance of a marketing order rule is only justified when the final goal and effect of the order is to increase the demand for the commodity by eliminating product with undesirable characteristics. A rule that controls the availability of grapes to consumers is likely to have the reverse effect of reducing grape demand for all suppliers, a direct contradiction to the intent of a marketing order. The availability of grapes on a year-round basis, in large part due to Chilean grapes being in the market during the off-season in the Northern Hemisphere, has helped to increase U.S. per-capita grape consumption, to the benefit of all suppliers.

Furthermore, there is no evidence about assertions attributed to the Desert Grape Growers League of California (DGGLC), in particular the one which states that low-quality Chilean grapes depress prices of California-supplied grapes (any effect resulting from the presence of Chilean grapes in overlapping weeks was a supply effect, not the result of a reduction in consumer demand). First, there is no indication of consumer dissatisfaction with the quality of Chilean grapes. Second, low prices for Chilean grapes coexist with high prices for Coachella grapes.

In this sense, the Government of Chile is aware that criteria for the economic justification of a minimum quality standard marketing order that is inconsistent with the Chile-U.S. FTA, as well as non compliant with multilateral (WTO-Technical Barriers to Trade Agreement) rules is, in practice, constituting an import prohibition for products

not complying with those quality requirements. In addition, what we have seen is that this has been a measure that artificially protects the DGGLC from competition. Moreover, since 1987 they have unsuccessfully tried several times to disrupt the supply of fresh table grapes from Chile and other countries in late spring months. The last effort in this direction was a proposal of modification to the MO 925¹, which we expect will also be rejected.

Contradiction with spirit of Chile-U.S. FTA and with the principles underlying the WTO Agreements

The Government of Chile considers that the MO rule contradicts the spirit and the letter of the Chile-U.S. FTA in which both parties declare their purpose “to create an expanded and secure market for goods and services produced in their territories”; and “avoid distortions in their reciprocal trade”. Chile believes that the MO 925 would go exactly in the opposite direction, distorting and creating artificial and unnecessary barriers to trade.

The rule violates the principle of **National Treatment** in two main fronts: First, it is applied to afford protection to domestic production since the MO 925 imposes US Nº1 quality and condition standards in a certain period of the year on all table grapes (except for Emperor, Calmeria, Almeria and Ribier) from the Coachella Valley, as well as imported grapes, but that rule does not apply for the rest of domestic production. In that sense, there is also basis for an allegation of a violation of article III.4 and article 3.17-1 of the Chile-U.S. FTA, because they state that: “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.”

Second, there is a discriminatory tax in contravention with the GATT, Article III. The **inspection fees** that are charged against Chilean supplies when everything produced outside of Coachella is completely exempted from the Federal inspection charges. Even if the inspection fee charged to importers and domestic producers appears to be the same on the face of the measure, there is a difference in timing of collection that is likely to result in differences in taxation (the inspection fee on imports is collected upon entry into the United States, and for domestic products, before they leave the packing area). That, in turn, creates a substantial advantage for domestic products as imports may suffer damage in transport that renders them unable to meet more stringent shipping point grading standards upon arrival in the U.S. and therefore impeding its sale. On the other hand, domestic products may be able to avoid the assessment for damaged grapes by diverting products to readily available processing facilities. Domestic producers also have the option of keeping table grapes in extended cold storage comparable to the two weeks of refrigerated shipment conditions that Chilean

¹ On May 2005, the AMS published in the Federal Register the proposal of modification to the Marketing Order 925 and Table Grape Import Regulation, which seeks to change the regulated period to April 1 through July 10 each year and modifies the maturity requirement for imported Flame Seedless.

producers face, but without the necessity of meeting shipping point standards when the grapes are then sold out of cold storage.

Furthermore, following the provisions of the **Technical Barriers to Trade Agreement** of the WTO, countries may apply standards, technical regulations and conformity assessment procedures to fulfill a legitimate objective, *inter alia* national security requirements, prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment. Those measures shall not be prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade and shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. We share this legitimate objective of a marketing order to protect consumers. However, we cannot see it as a legitimate measure to artificially interfere with consumers' decisions, by prohibiting during certain period of time the importation of products that do not comply with minimum requirements imposed. On the contrary, it has the risk of not fulfilling the legitimate purpose, affecting the consumer with shortage of supply and, as a result of that, artificially high prices. Under the TBT Agreement if a measure does not meet the intention for which it was meant, it becomes an unnecessary obstacle to trade. It turns out to be a more trade restrictive measure than necessary to fulfill the objective (TBT Art. 2.2 of the Agreement).

In summary

The Government of Chile requests that the United States Government, as our counterpart in the FTA, gives serious consideration to the arguments we are presenting. First, there is no evidence about the supposed low-quality or hidden defects in Chilean grapes that might have adversely affected the prices of grapes as a whole. Even in that case, there should not be any market intervention, since price mechanisms and market transactions can automatically account for the costs of the defects. This is in clear detriment for the consumer and only favors the profits of a small percentage of the U.S. domestic industry. Thus, it constitutes an unnecessary and inappropriate market intervention and a disguised restriction to international trade. Second, the measure is inconsistent with the Chile-U.S. FTA, as well as non compliant with multilateral (WTO-Technical Barriers to Trade Agreement) rules. Lastly, this kind of rules harms not only our exports, but the agricultural sector which is one of our main engines of job creation.